83-1786

No. ———

IN THE

Supreme Court of the United States

October Term, 1983

Obed Aarsvold; Barry Banks; Laurence Beauchene; Ralph Bell; Melvin Bier; Warren Blesi; Eppie Booker as Trustee of the Estate of Ulysses Booker, Jr., deceased; Mary Brockman; Robert Bursch; Harold Christensen; Maureen Godar; Dorothy Haapala; Gerald Hammer; Albert Harvey; Marina Haydon; Andrew Hjelmeland; John Hogan; Ricky Johnson; Joseph Jordahl; Charles Kobow; John Knodel; Curtis Larson; LeRoy Larson; William Lovegren; Robert Mayer; Gregory McRoy; Rodney Norton; Christopher Nowicki; Burtin Olson; Randal Pederson; Michael Powell; Gary Reck; Frank Rehder; Richard Rossini; Michael Serafin; Vincent Shepard; Elizabeth Sivanich; Gregory Smith; Eugene Theisen; Michael Tomascak; Peter Tomascak; Ed Tytus; Emmal Underwood; Jeffrey Varney,

Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and Amalgamated Transit Union, Division 1150.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statute of limitations controlling an employee's suit against his employer and union is tolled to a hypothetical date on which private arbitration measures would have been exhausted.

2. Whether an employee's suit against his employer and union is tolled pending initial recourse to the National Labor Relations Board.

3. Whether the holding of *Del Costello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983), should be applied retroactively.

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IN THE

Supreme Court of the United States

October Term, 1983

No. ————

Obed Aarsvold; Barry Banks; Laurence Beauchene; Ralph Bell; Melvin Bier; Warren Blesi; Eppie Booker as Trustee of the Estate of Ulysses Booker, Jr., deceased; Mary Brockman; Robert Bursch; Harold Christensen; Maureen Godar; Dorothy Haapala; Gerald Hammer; Albert Harvey; Marina Haydon; Andrew Hjelmeland; John Hogan; Ricky Johnson; Joseph Jordahl; Charles Kobow; John Knodel; Curtis Larson; LeRoy Larson; William Lovegren; Robert Mayer; Gregory McRoy; Rodney Norton; Christopher Nowicki; Burtin Olson; Randal Pederson; Michael Powell; Gary Reck; Frank Rehder; Richard Rossini; Michael Serafin; Vincent Shepard; Elizabeth Sivanich; Gregory Smith; Eugene Theisen; Michael Tomascak; Peter Tomascak; Ed Tytus; Emmal Underwood; Jeffrey Varney,

Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and Amalgamated Transit Union, Division 1150,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra)* is reported at 724 F.2d 73. The opinion of the district court (App. C, *infra)* is reported at 545 F.Supp. 622.

JURISDICTION

The order of the court of appeals was entered December 27, 1983. A petition for rehearing was denied on January 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

1. §301 of the Labor Management Relations Act (29 U.S.C. §185) provides in pertinent part:

   "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter...may be brought in any district court in the United States having jurisdiction of the parties,..."

2. §10(b) of the National Labor Relations Act (29 U.S.C. §160(b)) provides in pertinent part:

   "*Provided*...no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...."

STATEMENT

On December 5, 1980, petitioners (hereinafter "employees") were members of the Amalgamated Transit Union and employees of Greyhound Lines, Inc., working

in Minneapolis, Minnesota pursuant to a labor agreement due to expire October 31, 1980. Contract negotiators for Greyhound and the union had extended the contract conditioned on a 48-hour strike notice to Greyhound.

Notice of intent to strike was served on Greyhound effective December 5, 1980, and on that date many of the employees herein and employees at other Greyhound terminals around the country left their jobs or refused to report to work as scheduled. All Minneapolis employees deemed by Greyhound to be strikers, some fifty-five men and women, were immediately discharged even though some were on vacation or days off and were not actively participating in strike activity.

Greyhound sought an injunction from the district court to prohibit picketing. The United States Magistrate drafted an order conditioning an injunction on immediate reinstatement of the fired employees. However, Greyhound withdrew its request and the order never issued. The employees ceased all strike activity, but were never reinstated.

Grievances filed with Greyhound were summarily rejected by a company official. On or about March 13, 1981, the union notified its Minneapolis members by letter that it would not take their grievances to arbitration, even though it filed for arbitration for 28 employees discharged by Greyhound in Portland, Oregon, and secured their reinstatement.

The employees thereupon filed charges with the National Labor Relations Board alleging that because no labor agreement was in effect on December 5, 1980, their concerted activity was protected by the National Labor Relations Act and their discharges by Greyhound consequent-

ly constituted unfair labor practices. The NLRB agreed that the contract extension had been cancelled by the notice to strike, but ruled finally in late August, 1981, that conversations between company and union officials on December 4, 1980 created a new contract between Greyhound and its employees. Concluding that the implied contract precluded unfair labor practice charges against Greyhound, the NLRB declined to issue a complaint against either Greyhound or the union.

The present action, based on §301 of the Labor Management Relations Act, 29 U.S.C. §185, and the duty of fair representation imposed on unions by the National Labor Relations Act, was filed in state court in November, 1981, less than three months following the NLRB decision. The cause was removed to federal district court by Greyhound. Jurisdiction was found in 28 U.S.C. §1331 (a).

In April, 1982, Greyhound and the unions amended their respective answers to plead the running of the appropriate statute of limitations and jointly moved for summary judgment. Even though there was no arbitration of the employees' claims, and obviously no arbitration award, the district court held that on the basis of *United Parcel Service v. Mitchell*, 451 U.S. 56, Minnesota's ninety-day statute for limiting actions to vacate arbitration awards[1] would be applied, and granted judgment in favor of both company and union.

After appeal was taken to the eighth circuit and the case fully briefed, this Court granted certiorari in *Del Cos-*

[1]Minn. Stat. §572.19, Subd. 2, states in pertinent part: "An application under this section [for vacation of an arbitration award] shall be made within ninety days after delivery of a copy of the award to the applicant. . . ."

tello v. International Brotherhood of Teamsters. Following this Court's decision, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the present case was re-briefed. Without considering the employees' tolling arguments. the court of appeals concluded that the case had been commenced some eight months after the causes of action had accrued and was untimely under *Del Costello.* The court ruled further that the rule of *Del Costello* would be applied retroactively to affirm the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal labor law concerning circumstances under which the statute of limitations governing suits against employers for breach of a labor agreement and against unions for breach of duty of fair representation will be tolled in the interest of supporting important federal policy, and a third question, whether this Court's ruling in *Del Costello v. International Brotherhood of Teamsters* will be applied retroactively to suits commenced under pre-existing law, over which the circuit courts are in conflict.

The court of appeals affirmed an award of summary judgment against nearly fifty summarily fired employees who were thus denied a hearing either before an arbitrator, before the NLRB, or in the district court. To do so, the court of appeals overlooked important federal labor law policies favoring arbitration and initial recourse to administrative machinery in favor of inflexible application of procedural law. The decision of the court of appeals offers clear incentives to malfeasant employers and unions to short-circuit contract arbitration procedures and will compel aggrieved employees to forego appeals to the Na-

tional Labor Relations Board in favor of immediate recourse to the courts. In practical terms, unconditional application in the eighth circuit of the six-months limitation period now established by *Del Costello* will bar many future "§301/unfair representation" suits of merit. Moreover, the application by the court of appeals of the *Del Costello* rule retroactively to the kind of non-arbitrated claim herein presented represents a dramatic change of law in midstream, the basic inequity of which was recognized by the Court of Appeals for the Ninth Circuit in *Edwards v. Teamsters Local Union No. 36,* 719 F.2d 1036 (C.A. 9, 1983).

1. Unlike the employees in *Del Costello* and its companion case before this Court, *United Steelworkers of America, AFL-CIO-CLC v. Flowers* (and in *United Parcel Service v. Mitchell, supra),* petitioners herein were denied arbitration of their discharges, due to the alleged bad faith of their union. Aside from the obvious loss of relief through arbitration, the employees were denied the experienced investigation and development of their claims that normally accompanies the arbitration process. Application of a short statute of limitations to an employee denied arbitration subjects him to a significant disadvantage *vis a vis* the employee granted the time, the investigation of his case by his representative, and the insights of the arbitrator, as manifested in the award, prior to filing an action at law. The disadvantage to the employee denied arbitration equates to a clear advantage to the employer and union and thus offers a real incentive to dismiss the employee's grievance short of arbitration.

Arbitration of grievances has long been a cornerstone of the bargained agreement and of federal labor policy,

and is a cherished right of the wage-earner in the industrial setting. Its place is not lost upon this Court:

> "...Congress has specified in §203(d), 61 Stat. 154, 29 U.S.C. §173(d) that '[F]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes....'
>
> "This congressional policy 'can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.' "

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566.

Defending the arbitration process in *Hines*, Justice Rehnquist wrote, in dissent:

> "By subjecting the employer to a damages suit due to the union's failure to utilize the arbitration process on behalf of the employees, the *Vaca* decision[2] put pressure on both employers and unions to make full use of the contractual provisions for settling disputes by arbitration."

Ibid., 464 U.S. 554, 574. By refusing to toll the statute of limitations to a hypothetical arbitration date, readily determinable through reference to previously arbitrated matters,[3] the court of appeals will effect the opposite result. Instead of pressures to make full use of arbitration measures, employers and unions in the eighth circuit stand to shorten

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[2] *Vaca v. Sipes*, 386 U.S. 171.

[3] Cf. *Bowen v. United States Postal Service*, —U.S.—, 103 S.Ct. 588, 74 L.Ed. 2d 402 (1983).

the effective limitations period for suits against them by refusing to arbitrate disputes. Tolling the limitations period to a hypothetical arbitration date will not detract from but promote the federal interest in "relatively rapid" resolution of labor disputes by encouraging arbitration. Failure to do so will double the discrimination visited upon the worker already denied his right to arbitration.

The matter of to whom incentives will flow and for what purposes, at the expense of settled federal policy, ought to be determined by this Court.

2. This Court settled the issue of the appropriate statute of limitations to be applied to the cause herein presented in *Del Costello, supra.* Henceforth, the six-month period limiting the filing of charges of unfair labor practices with the National Labor Relations Board, found in §10(b) of the National Labor Relations Act (29 U S.C. §160(b)) will be applied to causes of action against both employer and union. The short limitations period of §10(b) was obviously enacted by Congress with the administrative procedure of the NLRB in mind. It is noteworthy that in order to protect his filing deadline with a charge to the NLRB, the employee need not concern himself with investigation, theories of law, retention of counsel or form of pleadings, but must merely subscribe to a brief recitation of facts. The staff of the NLRB conducts all necessary investigation, analysis, legal research and formal pleading subsequent to the employee's charge. In sum, the time-consuming preparations of a law suit, which properly precede its filing, occur in a proceeding before the NLRB *after* the charge has been filed.

Policy reasons put forth by Justice Stewart in arguing the appropriateness of §10(b) of the NLRA in *Mitchell,*

supra,[4] also commend initial recourse to the relief found in the Act. While suits under §301 are no longer subject to the NLRB's exclusive jurisdiction, the strong federal policy favoring initial recourse to the NLRB was clearly stated by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236:

> "...Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience...
>
> * * *
> * * *
>
> "At times it has not been clear whether the particular activity [of concern to a court] was governed by Section 7 or Section 8 or was, perhaps, outside both these Sections, but courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."

359 U.S 242, 244-245.

Upon being informed by their union that their discharges would not be brought to arbitration, the fifty-odd employees discharged by Greyhound immediately filed charges with the National Labor Relations Board. When the NLRB finally decided not to issue a complaint against the employer and union, the employees filed suit, within three months of the NLRB's decision. While the investigation and determination of the NLRB took only five months to complete, it delayed the filing of the present

[4] *Mitchell, Ibid*, 451 U.S. 56, 69.

law suit to a point approximately eight months subsequent to the union's refusal to arbitrate. The court of appeals' refusal to toll the statute of limitations for this brief period is a clear message to attorneys working in labor law that initial recourse to the NLRB is a luxury that cannot be afforded if the client's right to an action at law is to be protected. Dual filings with the NLRB and the courts will certainly result, with consequent waste of economic and judicial resources, apart from the prospect of inconsistent results.

The prospect of multiple filings is particularly obnoxious in a case such as that presented herein, in which the pleading in one forum would be antithetical to that made in the other. The employees herein went on strike believing that the contract which prohibited strikes had expired, a conclusion supported by the tangible evidence available to them. After investigation, the NLRB concluded that communications between company and union officials on the eve of the strike raised a new *implied* contract. It was on the basis of this implied contract that the NLRB refused to intervene and on which the employees subsequently filed suit. This Court's admonishment that the "specialized competence" of an administrative agency not be passed over, *Far East Conference v. United States*, 342 U.S. 570, 574-75, is particularly appropriate under such circumstances.

Prior to the NLRB determination, the employees herein could not have stated a cause of action under §301 on the basis of facts believed by them to be true. To plead otherwise in court would have been contrary to the employees' declaration of truth contained in their charge to the NLRB. Moreover, counsel could not have signed such

inconsistent pleadings in view of the admonition and sanctions of Rule 11, Federal Rules of Civil Procedure.

In a case such as that herein presented, the decision of the court of appeals will often compel dual, if not duplicitous, filing with the NLRB and in the courts. The alternative is to file in one forum knowing that recourse to the other is virtually waived by the aggrieved employee. Federal interests are better served by encouraging rather than discouraging an employee's initial recourse to the administrative agency uniquely and specifically designed to handle the dispute.[5] This Court should determine that the statute of limitations is tolled pending a decision by the NLRB to either issue a complaint or reject the employees' charge.[6]

3. There is a split among the circuit courts as to whether this Court's ruling in *Del Costello* shall be applied retroactively to cases pending. By footnote in its decision herein, the Court of Appeals for the Eighth Circuit noted merely that it had decided to apply *Del Costello* retroactively in *Linclon v. District 9 of International Association of Machinists*, 723 F.2d 627 (C.A. 8), decided December 27, 1983. Earlier, the United States Court of Appeals for the Ninth Circuit concluded that the *Del Costello* decision would not be applied retroactively. Both courts purported to apply the three-part test of retroactive application described by this Court in *Chevron Oil Co. v.*

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[5]Cf. *DeArroyo v. Sindicato de Trabajadores Packing House, AFL-CIO*, 425 F.2d 281, 287 (CA. 1, 1970) in which the First Circuit expressly chose a statute of limitations longer than the NLRB's six months so as to encourage initial recourse to the NLRB without precluding a subsequent civil suit should the Board refuse to pursue the matter for the employee.

[6]It is noted that the remedies available to the employee through the NLRB encompass all those available through the courts and more, and obviate altogether, if relief is obtained, a law suit against the offending union.

Huson, 404 U.S. 97. It is apparent that some aggrieved employees will find their day in court and others in similar positions will not, depending on the location of the action.

The eighth circuit's analysis in *Lincoln* is flawed in that it assumed that the law existing prior to *Del Costello* was that announced by this Court in *United Parcel Service v. Mitchell, supra*. It concluded therefrom that *Del Costello* did not represent a clear break from prior law.

The ninth circuit in *Edwards* correctly recognized that the *Mitchell* decision was inapposite to an employee's claim against his union (and noted further that *Mitchell* did not apply to an employee's claim against his employer where the union had failed to process the claim.[7]) The court concluded that *Del Costello* was a clear break from existing ninth circuit law,[8] that the policy reasons for allowing actions against unions were disserved by barring a suit that was timely filed under law existing at the time, and finally that applying a shorter statute of limitations than that existing at the time of filing was "inherently unfair", 719 F.2d 1036, 1040.

The law of the eighth circuit at the time the present action arose was clearly established in *Butler v. Local 823, Intl. Bro. of Teamsters*, 514 F.2d 442, which applied a state contract limitation to the employee's claim against both employer and union. While the *Mitchell* decision carved from this rule claims against employers which sought to overturn adverse arbitration awards, *Butler* remained the law in regard to claims against unions and claims against employers not analogous to the vacation

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[7] 719 F.2d 1036, 1039 (footnote 3), citing *Christianson v. Pioneer Sand and Gravel Co.*, 681 F.2d 577 (C.A. 9, 1982).

[8] *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 753, which applied a three-year statute of limitations.

of arbitration awards. Thus the present action was filed approximately eight months after the cause accrued, when eighth circuit law would have applied Minnesota's six-year limitation of actions on contract.[9]

The rule of law at issue in *Chevron Oil v. Huson* was similarly a statute of limitations, and the decision mitigates against retroactive application of the *Del Costello* rule. Here, as in *Chevron Oil*, the laws giving rise to the action are remedial and protective of the employee, providing a remedy against arbitrary acts of employer and union. Far from "sleeping on their rights", the employees herein quickly sought relief first from the NLRB and then through the courts. The inequity of retroactive application of *Del Costello* to the cause herein is manifest. Like the employee in *Chevro Oil*, the employees herein seek only a chance to vindicate their cause.[10]

Petitioners have witnessed an affront to fundamental fairness: summarily fired by Gryehound and abandoned by their union, they turned to the NLRB for relief; finding a contract, the NLRB could not act; suing on the contract, they are impaled by a new statute of limitations. Seeking only their day in court, the employees looked to their right of arbitration, to the NLRB, and to the district court, each an institution ostensibly intended to provide a hearing for the aggrieved worker. They have yet to see such a hearing.

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[9]Minn. Stat. §540.05. It is noteworthy that none of the three defendants alleged expiration of the statute of limitations in its answer to the employees' complaint.

[10]Absent the district court's misapplication of the *Mitchell* holding to the employees' claims herein, the case would have been tried before *Del Costello* was handed down. Prior to respondents' motions for summary judgment, the parties had been in discovery, had had a pretrial conference, and were ordered to be ready for trial on May 1, 1983.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

April 30, 1984.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1695

Obed Aarsvold, et al.,

Appellants,

vs.

Greyhound Lines, Inc., et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Submitted: December 20, 1983
Filed: December 27, 1983

Before ROSS and FAGG, Circuit Judges, and WATERS, District Judge.*

PER CURIAM.

This case is on appeal from the judgment of the

*The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

United States District Court for the District of Minnesota.[1] Jurisdiction is invoked pursuant to 28 U.S.C. § 1291 (Supp. 1983). The district court granted summary judgment in favor of appellees, Greyhound Lines, Inc., Amalgamated Transit Union, and Amalgamated Transit Union, Division 1150, on the basis that the suit filed under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1978) was not timely filed. This appeal followed.

Appellants are former employees of appellee Greyhound Lines, Inc. and former members of appellee Amalgamated Transit Union (hereinafter ATU) and appellee ATU Local Division No. 1150. Aarsvold argues that Greyhound discharged its employees without cause. Greyhound asserts that the employees were fired because they engaged in an illegal wildcat strike. After unsuccessful labor appeals, this suit was filed in November 1981, and removed to district court. Grievance hearings were held in accordance with the collective bargaining agreement. The discharged employees were informed in writing on March 13, 1981, that the local union membership voted not to proceed with the case to arbitration. The action was filed November 24, 1981.

Aarsvold further alleges that his claim did not accrue until the NLRB proceeding had run its course, which he states was August 1981, when the decision that no unfair labor practices occurred was affirmed by the office of general counsel. Thus urges Aarsvold, the statute was tolled pending a hypothetical arbitration date or a decision of the NLRB. He cites *Bowen v. United States Postal Service*, 103 S.Ct. 588 (1983) in support of his contention. Our reading of *Bowen*, however, suggests that it does not stand

[1]The Honorable Harry H. MacLaughlin presiding.

for the propositions asserted by Aarsvold. The *Bowen* case dealt with apportioning damages, not with whether a cause of action was tolled pending a hypothetical arbitration date.

During the pendency of this appeal, the Supreme Court decided the case of *Del Costello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983). *Del Costello* held that Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) with its six month limitation period governed section 301 suits.[2]

We have carefully reviewed Aarsvold's remaining contentions and find them to be without merit. Aarsvold is clearly out of time under *Del Costello*. We find that the statute began to run on March 13, 1981, when the membership voted not to proceed with the case to arbitration. The district court's order dismissing the case is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[2]We have held that *DelCostello* is to be applied retroactively. *Lincoln v. District 9 of the International Association of Machinists*, No. 82-1691 (8th Cir. Dec. —, 1983).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1983

82-1695-MN.

Obed Aarsvold, et al.,

Appellants,

vs.

Greyhound Lines, Inc., et al.,

Appellees.

Appeal from the United States District Court for the District Court of Minnesota

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

January 31, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Obed Aarsvold, et. al;

Plaintiffs,

vs.

Greyhound Lines, Inc., et al.,

Defendants.

CIVIL 4-81-903

MEMORANDUM AND ORDER

[Filed May 28, 1982]

James E. Lindell, Lowe and Schmidthuber, 1610 IDS Center, Minneapolis, MN 55402, for plaintiffs.

Vance B. Grannis, Jr., Roger N. Knutson, Grannis, Grannis, Campbell & Farrell, P.A., 403 Northwestern Bank Building, 161 North Concord Street, South St. Paul, MN 55075, for defendant Greyhound Lines, Inc.

Roger A. Jensen, Peterson, Bell & Converse, 1800 American National Bank Building, St. Paul, MN 55101, for defendant Amalgamated Transit Union.

Robert Latz, Robert Latz, P.A., 4150 IDS Center, Minneapolis, MN 55402, for defendant Amalgamated Transit Union, Division 1150.

This action involves a claim for a breach of a collective bargaining agreement. The plaintiffs were employed by defendant Greyhound Lines at the time of the event which led to this lawsuit. The defendants were members of the Amalgamated Transit Union (ATC) and Amalgamated Transit Union, Division 1150 (Division 1150). ATU had negotiated a collective bargaining agreement with Greyhound which was due to expire on October 31, 1980. The agreement was extended in the course of negotiations for a new agreement, but the extension would terminate upon a 24-hour strike notice to Greyhound. On December 2, 1980, Greyhound union employees rejected a proposed new contract. Notice of a strike to commence on December 5, 1980, was sent to Greyhound. On December 4, 1980, ATU entered into another agreement with Greyhound to extend the old bargaining agreement. The plaintiffs allege that they were not informed of and did not approve the new extension. On December 5, 1980, many members of local branches of ATU, including members of Division 1150, went on strike or refused to report to work as scheduled. The plaintiffs here are some of the employees who went on strike. Greyhound fired the plaintiffs, asserting that there was just cause for doing so because the employees engaged in a strike prohibited under the preexisting bargaining agreement.

The plaintiffs filed grievances through Division 1150 representatives protesting their discharges. Greyhound representatives held hearings on the grievances in January, 1981. The grievances were denied. The plaintiffs allege that ATU and Division 1150 failed to represent the plaintiffs fairly and in good faith. Division 1150 submitted to a vote of union members the question of whether to take

the plaintiffs' grievances to arbitration. The vote was negative. The plaintiffs claim that the failure to take their grievances to arbitration was a further breach of the duty of fair representation and denied them full recourse to their administrative remedies.

A new contract between ATU and Greyhound was reached after the plaintiffs lodged complaints against Greyhoud with the NLRB in March, April and May of 1981. These complaints were denied in late August, 1981. The instant lawsuit was begun on November 24, 1981.

The matter is now before the Court on Greyhound's motion for summary judgment. Defendants Division 1150 and the Union have joined in Greyhound's motion. The defendants argue that the cause of action is barred by Minnesota's 90-day statute of limitations on actions to vacate arbitration awards. For the reasons stated herein, summary judgment will be granted.

DISCUSSION

The plaintiffs' section 301 claim involves the contention that the union defendants failed to utilize to the fullest extent the employees' remedies under the collective bargaining agreement, thereby breaching the duty of fair representation. Claims for breach of this duty may arise when a union either refuses to process or perfunctorily processes an employee's claim against the employer. A union may breach its duty of fair representation by refusing to process a grievance through the level of arbitration, but only if the refusal was in bad faith. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 566-67 (1976); *Vaca v. Sipes*, 386 U.S. 171, 188-193 (1967). The plaintiffs have alleged a bad faith refusal to take their grievances to ar-

bitration. Thus, the plaintiffs' complaint presents a common garden variety action for breach of the duty of fair representation. However, it must be remembered that actions for breach of the duty of fair representation are attempts to override the grievance machinery established in the collective bargaining agreement. In the usual situation, the grievance machinery culminates in arbitration and is the final and exclusive means for resolving disputes between employers and employees.

Minnesota law provides that suits to vacate arbitration awards must be brought within 90 days of receipt of such awards. Minn. Stat. § 572.19, Subd. 2 provides:

> An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

The issue is whether this 90 day statute of limitations applies to this case.

In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), the United States Supreme Court held that New York's 90 day statute of limitations for vacating arbitration awards applied to a suit attempting to overturn the decision of an arbitration panel established in a collective bargaining agreement to resolve labor grievances. Mitchell, the employee, was fired from his job in January, 1977. He filed a grievance through his Union, and the matter was submitted to a Joint Panel. After a hearing in February, 1977, the Joint Panel upheld the discharge. Seventeen months later, the employee brought an action

in federal district court claiming that the union had breached its duty of fair representation and that the employer had improperly discharged him. The district court ruled that New York's 90-day statute of limitations for actions to vacate arbitration awards applied to the case and granted summary judgment for the defendants. The Second Circuit reversed, holding that the six year limitations period for breach of contract was the applicable statute of limitations. The United States Court reversed the Second Circuit, ruling that the district court correctly applied the 90-day limitations period. The Supreme Court held that an action for breach of the duty of fair representation is more analogous to an action to vacate an arbitration award than an action for breach of contract.

The plaintiffs attempt to distinguish *United Parcel Service* by arguing that it applies only when the grievance machinery has been utilized to the final step of arbitration. They contend that because the unions here did not take the last step of submitting the plaintiffs' grievances to arbitration, the holding of *United Parcel Service* does not apply. However, the Supreme Court characterized the issue before it broadly, stating: "We are called upon in this case to determine which state statute of limitations period should be borrowed and applied to an employee's action against his employer under § 301(a) of the [LMRA] and *Hines v. Anchor Motor Freight, Inc.* . . ." 451 U.S. at 58.[1]

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[1]The Supreme Court indicated that the plaintiff's characterization of his lawsuit was not of controlling significance; rather, the effect of the action must be determined.

> Although respondent did not style his suit as one to vacate the award of the Joint Panel, if he is successful the suit will have that direct effect. Respondent raises in his § 301 action the same claim that was raised before the Joint Panel—that he was discharged in violation of the collective-bargaining agreement. He seeks the same

The plaintiffs' argument holds some initial appeal. It appears harsh to prohibit a person from challenging an arbitration award if the person's claim is that his or her own representative failed to bring the grievance to the highest level of arbitration. However, this seeming paradox is present in any section 301(a) suit containing an allegation that the union breached its duty of fair representation. Any breach of the duty of fair representation undercuts the foundation of the grievance process. A failure to process a grievance to a higher level of arbitration is merely one way that a union can breach its duty of fair representation. There is no apparent reason to draw a distinction for statute of limitations purposes between a union that arbitrarily refuses to process a member's grievance to the highest level and a union that goes through the motions of processing a grievance to the highest level but does so in bad faith. *See Dreher v. Crown Zellerbach Corp.*, No. 80-185LE (D.Ore. 1982); *Fields v. Babcock & Wilcox*, No. 81-385 (W.D. Pa. 1981).

Based on the foregoing, it is the judgment of the Court that Minnesota's 90 day statute of limitations on actions to vacate arbitration awards is the statute most nearly analogous to the plaintiffs' claim.

Accordingly,

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relief he sought before the Joint Panel—reinstatement with full backpay. In sum, "it is clear that [he] was dissatisfied with and simply seeks to upset the arbitrator's decision that the company did not wrongfully discharge him."
451 U.S. at 61. In this case, the plaintiffs raise the same claim as was raised in their grievances—that they were wrongfully discharged. They also seek the same relief as was sought in their grievances—reinstatement with seniority rights, plus damages, presumably for lost wages.

IT IS ORDERED that the defendants' motion for summary judgment be, and hereby is, granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: May 28, 1982.

No. 83-1786

IN THE

Supreme Court of the United States

October Term, 1983

OBED AARSVOLD; BARRY BANKS; LAURENCE BEAUCHENE; RALPH BELL; MELVIN BIER; WARREN BLESI; EPPIE BOOKER, as Trustee of the Estate of Ulysses Booker, Jr., deceased; MARY BROCKMAN; ROBERT BURSCH; HAROLD CHRISTIANSEN; MAUREEN GODAR; DOROTHY HAAPALA; GERALD HAMMER; ALBERT HARVEY; MARINA HAYDON; ANDREW HJELMELAND; JOHN HOGAN; RICKY JOHNSON; JOSEPH JORDAHL; CHARLES KOBOW; JOHN KNODEL; CURTIS LARSON; LEROY LARSON; WILLIAM LOVEGREN; ROBERT MAYER; GREGORY McROY; RODNEY NORTON; CHRISTOPHER NOWICKI; BURTIN OLSON; RANDAL PEDERSON; MICHAEL POWELL; GARY RECK; FRANK REHDER; RICHARD ROSSINI; MICHAEL SERAFIN; VINCENT SHEPARD; ELIZABETH SIVANICH; GREGORY SMITH; EUGENE THEISEN; MICHAEL TOMASCAK; PETER TOMASCAK; ED TYTUS; EMMAL UNDERWOOD; JEFFREY VARNEY,

Petitioners,

vs.

GREYHOUND LINES, INC.; AMALGAMATED TRANSIT UNION; and AMALGAMATED TRANSIT UNION, DIVISION 1150,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners pose three questions in their Petition for Writ of Certiorari:

1. Whether the six month statute should be tolled pending a hypothetical arbitration date since this case never went to arbitration;

2. Whether the six month statute of limitations should be tolled during the period several of the employees' unfair labor practice charges were being investigated by the National Labor Relations Board; and

3. Whether the *DelCostello/Flowers* decisions should be applied retroactively.

This brief in opposition to certiorari being granted limits itself to the last issue, that is, the issue of retroactive application of the *DelCostello/Flowers* decisions, which is the only issue where there is a split in circuits and which has an impact beyond the facts of this particular case.

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IN THE

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Amalgamated Transit Union, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 724 F.2d 73.

STATEMENT OF CASE

Petitioners were all employees of Greyhound Lines, Inc., and were members of Division 1150 of the Amalgamated Transit Workers Union. They were discharged from their employment by Greyhound in December 1980 for participating in a strike which was in violation of the no strike clause of the collective bargaining agreement between Greyhound and the Union at Greyhound's Minneapolis, Minnesota, terminal.

The collective bargaining agreement between the Union and Greyhound provided a very typical multi-step grievance procedure. The first step of the grievance procedure is the presentation of the written grievance to a supervisor designated by the Employer. If not resolved, the second step is an appeal to a regional vice president or his representative for a written decision. If the matter is not satisfactorily resolved at the regional vice president's level, then, within forty-five days of the regional vice president's decision, the matter may be appealed by the Union to final and binding arbitration. Each of the steps requires action to be taken by the Union within a set period of time and, if that action is not taken, the effect is that the last step Employer response is deemed to be "final and binding" on the parties.

After the terminations, timely grievances were filed protesting the discharges of the employees. Hearings were held on the grievances before the regional vice president's representative in accordance with the second step of the grievance procedure. Those hearings were held on January 14, 15, and 16, 1981, and a representative of the local Union appeared at each of the hearings to represent the employees. Written decisions were issued by the representative upholding each of the discharges between January 15 and January 23, 1981.

The matter was then referred back to the local Union membership for a decision on whether or not the case should be appealed to arbitration. A membership vote was taken, pursuant to the Union Constitution requiring such a vote, at which vote the appellants participated along with other Union members. A majority of the membership voted not to appeal the case to arbitration. The discharged employees were advised of the results of the membership vote on March 13, 1981, and it was that date the Circuit Court concluded that the cause of action accrued.

Several of the employees then filed charges with the National Labor Relations Board against the Union and Greyhound between March and May, 1981. The Regional Director of the National Labor Relations Board, Eighteenth Region, refused to issue a complaint against Greyhound or the Union and the decision was affirmed by the General Counsel of the National Labor Relations Board on July 21, 1981. A request for reconsideration was denied on August 19, 1981.

This action was commenced by the appellant in the Minnesota State Courts on November 24, 1981. The matter was removed to the United States District Court, District of Minnesota, in December, 1981.

Each of the defendants moved for summary judgment claiming the ninety day statute of limitations established by the Supreme Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), decided by this Court on April 20, 1981, had run prior to the commencement of the action. United States District Court Judge Harry H. MacLaughlin granted the summary judgment motions of the three respondents, dismissing the employees' claim.

After the District Court's decision and before a decision on the appeal to the Eighth Circuit was made, this Court mod-

ified its previous ruling with regard to the statute of limitations in duty of fair representation cases in *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); and *United Steelworkers of America v. Flowers*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 746 (1983), applying the six month statute of limitations provided for in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b). The Eighth Circuit Court of Appeals affirmed the District Court's decision, dismissing the employees' claims against Greyhound and the Unions, relying upon the *DelCostello/Flowers* decisions by applying them retroactively.

REASONS WHY THE WRIT SHOULD BE DENIED

Eighth Circuit Fully And Correctly Decided Issue

Despite the brevity of the Eighth Circuit's decision, it fully and correctly decided the issue and retroactively applied the *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 746 (1983), decision to apply the Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b), statute of limitations to duty of fair representation cases.

The Eighth Circuit relied on its recent decision in *Lincoln v. IAM District Lodge 9*, 723 F.2d 627 (8th Cir., 1983). In *Lincoln*, the Eighth Circuit applied a three-factor test to be used in determining whether or not a new case dealing with statutes of limitations should be applied retroactively, as established by this Court in *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971):

1. Whether a new principle of law is established;
2. Whether a retroactive application will further or retard the operation of the rule; and
3. Whether retroactive application will produce substantial inequitable results.

Concerning the first factor, the Eighth Circuit properly concluded that the *DelCostello* decision was not a clear break from prior law and that "prior notice of a shorter period" was given by the Supreme Court in *United Parcel Services v. Mitchell*, 451 U.S. 56 (1981).

In *Mitchell*, the state's Uniform Arbitration Act ninety day statute of limitations was adopted by this Court. In his concurring opinion, Justice Stewart suggested that the six month limitation period provided in Section 10(b) of the Labor Management Relations Act be applied. The *Mitchell* decision came down on April 20, 1981, but appellant waited until November 24, 1981, to bring this action.

Petitioners, therefore, had ample notice that the statute of limitations applicable to duty of fair representation cases had been shortened considerably to ninety days based upon the majority decision in *Mitchell*, and, at the very most, six months based upon Justice Stewart's concurring opinion.

It should also be noted that in a footnote to her dissenting opinion in the *DelCostello* case, Justice O'Connor endorsed retroactive application of *Mitchell* because it was not a "clear break" with past law.

The second factor regarding whether retroactive application of the rule would further operation of the rule was also properly answered in the affirmative. Part of this Court's rationale for adopting the shorter limitations period was to

bring about a relatively rapid resolution of labor disputes which this Court and the Congress have, on a number of occasions, declared to be the national labor policy. Application of the six month statute, rather than the Minnesota six year statute of limitations for tort and contract actions, advances that federal labor policy.

The last factor dealing with the equities of the retroactive application has also been satisfied. Under *Mitchell*, appellants had only ninety days to commence their action. *DelCostello* doubled that time to six months, expanding the time during which the employees could have brought their action by a factor of two.

In at least two cases from other Circuits (*Hand v. Chemical Workers*, 712 F.2d 1350 (11th Cir., 1983); and *Storck v. Teamsters Local 600*, 712 F.2d 1194 (7th Cir., 1983)) the retroactive application of the six month *DelCostello* rule salvaged cases for plaintiff employees where they otherwise would have been time-barred.

In those cases, the employees brought their actions between ninety days and six months of the accrual of their causes of action. By the retroactive application of the six month statute, their claims which would have been time barred under the ninety day statute, were not time barred under the six month statute.

If the facts of this case were somewhat different and petitioners had brought their action between ninety days and six months of the accrual of their cause of action, we no doubt would be hearing the same petitioners urging retroactive application of the six month period to avoid the dismissal of their case by the District Court based upon the ninety day statute provided for by *Mitchell*.

Thus, all of the factors of *Chevron* have been satisfied and the Eighth Circuit's decision properly applied *DelCostello* retroactively.

It should also be noted that, in addition to the Eighth Circuit's retroactive application of *DelCostello*, the Third, Seventh, and Eleventh Circuits have applied *DelCostello* retroactively in *Perez v. Dana Corp. and Steelworkers*, 718 F.2d 581 (3rd Cir., 1983); *Storck v. Teamsters Local 600*, 712 F.2d 1194 (7th Cir., 1983); and, *Hand v. Chemical Workers*, 712 F.2d 1350 (11th Cir., 1983), after applying the *Chevron* test.

Only the Ninth Circuit in *Edwards v. Teamsters Local 36*, 719 F.2d 1036 (9th Cir., 1983), refused to apply *DelCostello* retroactively. There, in making a *Chevron* analysis, the Ninth Circuit concluded, we believe incorrectly, that *Mitchell* did not "clearly foreshadow" *DelCostello*. To the contrary, as we have suggested previously, *Mitchell* clearly put petitioners on notice that a reduced limitation period was going to be applied to duty of fair representation cases and, as we have stated previously, Justice Stewart's concurring opinion specifically suggested that the 10(b) six month statute of limitations be adopted.

Finally, the Ninth Circuit concluded that retroactive application of the rule would produce an inequity for plaintiffs. In the context of that particular factual setting, such a conclusion is understandable. But application of the rule to the broad spectrum must be considered. Examination of the broad spectrum of such duty of fair representation cases produces examples where retroactive application will both bar claims and salvage claims which would otherwise be barred under *Mitchell*. With such an overall view in mind, retroactive application is not inequitable, but is fair, reasonable, and consistent.

CONCLUSION

For the reasons set forth above, the Amalgamated Transit Workers Union respectfully requests that certiorari not be granted in this case.

Respectfully submitted,

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83-1786

No. ———

IN THE

Supreme Court of the United States

October Term, 1983

Obed Aarsvold; Barry Banks; Laurence Beauchene; Ralph Bell; Melvin Bier; Warren Blesi; Eppie Booker as Trustee of the Estate of Ulysses Booker, Jr., deceased; Mary Brockman; Robert Bursch; Harold Christensen; Maureen Godar; Dorothy Haapala; Gerald Hammer; Albert Harvey; Marina Haydon; Andrew Hjelmeland; John Hogan; Ricky Johnson; Joseph Jordahl; Charles Kobow; John Knodel; Curtis Larson; LeRoy Larson; William Lovegren; Robert Mayer; Gregory McRoy; Rodney Norton; Christopher Nowicki; Burtin Olson; Randal Pederson; Michael Powell; Gary Reck; Frank Rehder; Richard Rossini; Michael Serafin; Vincent Shepard; Elizabeth Sivanich; Gregory Smith; Eugene Theisen; Michael Tomascak; Peter Tomascak; Ed Tytus; Emmal Underwood; Jeffrey Varney,

Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and Amalgamated Transit Union, Division 1150,

Respondents,

BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the statute of limitations controlling an employee's suit against his employer and union is tolled to a hypothetical date on which private arbitration measures would have been exhausted.

The U.S. Court of Appeals, Eighth Circuit, held in the negative, stating that this question was decided in *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983).

2. Whether the employee's action accrues only upon a negative determination by the NLRB.

The U.S. Court of Appeals, Eighth Circuit, held in the negative.

3. Whether the holding of *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983), should be applied retroactively.

The U.S. Court of Appeals, Eighth Circuit, held in the affirmative.

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BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI

REASONS FOR DENYING GRANT OF THE WRIT

ISSUE 1. In his petition requesting review of the Judgment of the United States Court of Appeals, Eighth Circuit, Obed Aarsvold et al. (hereafter Aarsvold) urges that an employee should be given a period of time up "to a hypothetical arbitration date" to bring his unfair representation action against his union. This is clearly nothing more than an invitation to relitigate the decision in *DelCostello v. International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983) (6 month limitations period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), governs unfair representation actions). This invitation should be rejected.

For purposes of this consideration, the facts in *Aarsvold* do not place it in a category distinct from *DelCostello.* DelCostello complained to his union, brought a formal grievance under the collective bargaining agreement, and was informed by the appropriate committee that his grievance was without merit. DelCostello charged that his employer had discharged him in violation of the collective bargaining agreement, and that the union had pursued his grievance "in a discriminatory, arbitrary and perfunctory manner". 103 S.Ct. at 2286.

Aarsvold filed his grievance through Division 1150 representatives. His grievance was denied. Following Aarsvold's subsequent complaint, the members of Division 1150 voted on whether his grievance should be arbitrated. The vote was no. Aarsvold filed claims against his employer with the NLRB and later brought this complaint against the union for breach of its duty of fair representation for failure to take the grievance to arbitration.

As the Eighth Circuit correctly explained, claims for breach of the duty of fair representation "may arise when a union either refuses to process or perfunctorily processes an employee's claim against the employer." *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 73 (8th Cir. 1983), *rehearing denied* (1984). (App. A-7). As the District Court stated, there is "no reason to draw a distinction for statute of limitations purposes between a union that arbitrarily refuses to process . . . and a union that goes through the motions of processing a grievance to the highest level...." *Aarsvold v. Greyhound Lines, Inc.*, 545 F. Supp. 622 (D. Minn. 1982) (App. A-5).

In *DelCostello* the Court noted and considered a myriad of possible limitation periods. It did not lightly reject *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), which "suffer[ed] from flaws of both legal substance and practical application." Establishing a "hypothetical arbitration date" would be a step backward from the *DelCostello* decision. Aarsvold offers absolutely no support for his assertion that such a date would be "readily determinable".

The Eighth Circuit correctly held that this question was decided by *DelCostello*. Aarsvold explicitly admits this in his Petition on page 8. Thus appellate review is unwarranted.

Moreover, only a single unfair labor practice charge for one employee, out of approximately 54 Plaintiffs, was filed with the NLRB against this local union. This one charge was later voluntarily withdrawn by the charging party. Therefore, tolling under any circumstances is inappropriate as to this Respondent.

ISSUE 2. The issue of the tolling of the statute of limitations was *not* presented to the district court herein. It was, therefore, inappropriate to raise it to the Eighth Circuit Court of Appeals, as we demonstrated to that court, and it is likewise inappropriate to raise it before this court.

Nevertheless, to address the issue, both the United States Supreme Court and the Eighth Circuit have held that the commencement of an administrative proceeding does *not* toll the statute of limitations as to a cause of action where the facts are essentially the same. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Burns v. Union Pacific Railroad*, 564 F.2d 80 (8th Cir. 1977). *See also Electrical Workers v. Robbins and Myers*, 429 U.S. 299 (1976), holding that the existence and utilization of collective bargaining procedures does not toll running of a statutory limitations period for filing a claim with the EEOC.

There is nothing which prevented Aarsvold from filing unfair labor practice charges with the NLRB and commencing his §301/fair representation claims at the same time. He could then have stayed the action on the court claim until the NLRB acted. *See Electrical Workers v. Robbins and Myers*, —— U.S. at ——, 97 S.Ct. at 448. The faliacy of Aarsvold's argument is highlighted by Judge MacLaughlin in his opinion in *Sundquist v. American Hoist & Derrick*, 553 F. Supp. 924, 930 (D. Minn. 1982):

> "The policies of labor legislation—stability and rapid settlement of disputes—would be undermined if a plaintiff could satisfy the limitations period by merely filing a charge with the N.L.R.B. and then wait years before filing a suit."

Aarsvold is, in effect, arguing for an automatic tolling of the statute of limitations in every instance that an unfair labor practice charge embodying the substance of a §301/fair representation claim is filed with the NLRB. This would lead to unprecedented consequences, including the filing of many unnecessary unfair labor practice charges just to toll the statute.

There is no reason on the merits to toll the statute of limitations here. The underlying legal issue in the NLRB proceeding was identical to that which underlies Aarsvold's lawsuit. The legal issue was whether the collective bargaining agreement was in effect on December 5, 1980, when Aarsvold and the other plaintiffs went out on strike. If it was, the strike was in breach of the no-strike clause in the agreement, and the discharges were appropriate.

Tolling a statute of limitations for a long period of time puts a premium on delay on the part of potential plaintiffs, during which time records may be lost, union officers may change, witnesses die or become unavailable and memories fade. There is no accurate way to predict how long an NLRB investigation and decision might take. Because an employee may fail before the NLRB, but prevail in his court suit, the employee is not denied due process. The employee is actually benefited by the opportunity for a dual claim.

The reasons underlying the federal policy of rapid labor dispute resolution dictate that an employee should consider and be prepared in each instance to meet the relevant time limitations. *See Mitchell, supra; United Auto Workers v. Hoosier Cardinal Corporation,* 386 U.S. 696 (1966); *Lincoln v. District 9, International Association of Machinists and Aerospace Workers,* 723 F.2d 627 (8th

Cir. 1983). *See also Hall v. Printing & Graphic Arts Union,* 696 F.2d 494 (7th Cir. 1982) (increased risks of reinstatement and payment of back pay to discharged employees result from long statutes of limitation).

Aarsvold admits he and the others filed with the NLRB "upon being informed by their union that their discharges would not be brought to arbitration." (Petition-9). As the Court of Appeals held, this date, March 13, 1981, was the date the period of limitations began to run. (App. A-3). *Accord, Butler v. Local Union 823, I.B.T.,* 514 F.2d 442 (8th Cir. 1975) (action against union accrues when union engages in acts of alleged unfair representation).

ISSUE 3. In determining whether *DelCostello* should be applied retroactively, the 8th Circuit held:

(1) There was no clear break from the prior law, and the employee was on notice of a potentially shorter period because of *Mitchell;*

(2) Retroactive application of *DelCostello* would further the policy of prompt settlement, particularly since the employee waited over six months after the *Mitchell* case was decided to file his suit; and

(3) Because there was no clear break from prior law, and because the employee was on notice, the result would not be unjust or inequitable.

See Lincoln v. District 9 of International Association of Machinists, 723 F.2d 627 (8th Cir. 1983), *applying Chevron v. Huson Oil,* 404 U.S. 97 (1971).

The issue of whether *DelCostello* is to be applied retroactively has been ruled upon by six Circuit Courts in

addition to the 8th Circuit's ruling in *Lincoln*. Three of those decisions, by the Third, Seventh and Eleventh Circuits, are cited in *Lincoln: Hand v. International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983) (per curiam); *Perez v. Dana Corp. & USWA*, 718 F.2d 581 (3rd Cir. 1983); *Storck v. International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). Since *Lincoln*, two other Circuits have reached the same conclusion. They are *Murray v. Branch Motor Express*, 723 F.2d 1146 (4th Cir. 1983) and *Edwards v. Sea-Land Service*, 720 F.2d 857 (5th Cir. 1983). The only Circuit Court decision to the contrary is the 9th Circuit's decision in *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983). The differences between the 9th Circuit's decision in *Edwards* and those by the other circuits may be explained by the pre-*DelCostello* rules in the circuits as to statutes of limitations. It appears that the 9th Circuit had adopted what might be termed a hard and fast three year limitations period. *See Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 753 (9th Cir. 1978). The 9th Circuit rule differed from that of the 8th Circuit, which maintained flexibility by "characterizing" the cases. *See Butler v. International Brotherhood of Teamsters Local 823*, 514 F.2d at 448 (contract limitation period of five years does *not* have application to *all* fair representation suits).

Aarsvold then was on notice by virtue of *Butler, supra*, that he and the others could *not* rely on the state's limitations period governing contracts. *See Folsom v. Teamsters Local Union No. 41*, 576 F. Supp. 1033 (W.D.Mo. 1983) (employees in 8th Circuit were on notice after *Mitchell* that they could *not* rely on previous statute of limitations); *Scott v. Local 863*, 725 F.2d 226, 228 n.1 (3rd Cir.

1984) *(Mitchell* did foreshadow *DelCostello).* Thus, *DelCostello* was *not* a clear break from prior law.

The action by Aarsvold was commenced on November 24, 1981, close to one year after his discharge; more than eight months after the union membership voted not to arbitrate his grievance; and seven months after *Mitchell* was decided. Therefore, under *Lincoln* and the *Chevron* criteria, Aarsvold had time to digest *Mitchell after Mitchell* with its 90 day limitations period was decided and still bring a timely court action. But Aarsvold and the other plaintiffs did not.

Separate and apart from its determination that the three pronged test in *Chevron Oil* was satisfied, the 8th Circuit, in *Lincoln,* made the following important and separate determination:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (Citing U.S. Supreme Court decisions)

CONCLUSION

One of the principal values of the *DelCostello* decision is that it restores certainty to the law, so that all parties know that there is a fixed time period within which they have to commence their §301/fair representation actions, regardless of what the state statute of limitations may be, and regardless of whether unfair labor practice proceedings have or have not been commenced. The Circuit Courts are almost unanimous in applying *DelCostello* retroactively. The unique circumstances within the 9th Circuit result-

ing in the *Edwards* decision do not create a substantial federal question justifying the granting of the Writ of Certiorari.

For all of the above reasons, it is respectfully submitted that the Petition herein be denied.

Dated: May 18, 1984.

Respectfully Submitted,

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